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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

GERMAR SCHEERER, A/K/A GERMAR RUDOLF,

Petitioner,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether the Board of Immigration Appeals, within the Executive Office for Immigration Review of the U.S. Department of Justice, abuses its discretion as a matter of law in denying a motion to reopen and continuance to allow for an arriving alien in removal proceedings to obtain a determination of her adjustment of status application by the Department of Homeland Security's United States Citizenship and Immigration Services?

PARTIES TO PROCEEDING

The Petitioner is Germar Scheerer a.k.a. Germar Rudolf. The Respondents are Michael Mukasey, the Attorney General of the United States and Michael Chertoff, the Secretary of the Department of Homeland Security of the United States.

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PETITION FOR WRIT OF CERTIORARI

Germar Scheerer a.k.a. Germar Rudolf respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is reported at 513 F.3d 1244 (11th Cir. 2008). The opinion of the Board of Immigration Appeals denying Petitioner's motion to reopen is unreported. The opinion of the Immigration Judge ordering the Petitioner removed from the United States is unreported.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on January 15, 2008. Petitioner did not petition the Court of Appeals for rehearing or rehearing *en banc*. On March 21, 2008, Petitioner filed an application to extend time to file a Petition for writ of certiorari, which this Honorable Court granted on March 26, 2008, extending the deadline to June 13, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

8 C.F.R. § 1245(a)(1) provides that an immigration judge (IJ) has exclusive jurisdiction to adjudicate any application for adjustment of status that an alien who has been placed in deportation or

removal proceedings may file. It further permits arriving aliens in removal proceedings to apply for adjustment of status, but deprives the IJ of jurisdiction to adjudicate such applications, instead conferring jurisdictions solely upon USCIS.

STATEMENT

This case involves the issue of whether the BIA abuses its discretion as a matter of law in denying a motion to reopen and continuance so that an arriving alien in removal proceedings may obtain a determination of her adjustment of status application before USCIS. The Eleventh Circuit Court of Appeals held that the BIA's refusal to reopen and continue is not an abuse of discretion. However, both the Second and Ninth Circuit Courts of Appeals have held to the contrary. To resolve this split in the circuits, this Honorable Court should grant writ of *certiorari* in this case.

Petitioner, a native and citizen of Germany, is married to a U.S. citizen and is the father of a U.S. citizen child. Petitioner fled his homeland in 1995 to escape a prison sentence and further prosecution for allegedly inciting racial hatred in violation of German Penal Code, Strafgesetzbuch ar. 130, §§ 305 (F.R.G.) (Section 130). Petitioner entered the U.S. on August 9, 2000 as a conditional parolee and subsequently filed an application for asylum and withholding of removal. On April 22, 2001, legacy Immigration and Naturalization Service ("INS") issued Petitioner a Notice to Appear ("NTA"), finding him removable for failure to possess a valid entry document. An IJ ultimately found Petitioner removable as charged in the NTA. Petitioner appealed the order and the BIA affirmed without opinion on November 8, 2004.

While his petition before the BIA was pending, Petitioner filed a motion with the BIA to reopen removal proceedings so that he could adjust

his status to that of a lawful permanent resident based on his marriage to a U.S. citizen. The BIA denied this motion, finding that, as an arriving alien in removal proceedings, Petitioner was ineligible under former 8 C.F.R. § 1245.1(c)(8). Petitioner filed a motion for reconsideration with the BIA which the BIA also denied.

Petitioner then filed two timely petitions for review with the Eleventh Circuit of the BIA decisions denying Petitioner's motion to reopen his removal proceedings and further motion for reconsideration, and these appeals were consolidated. In November, 2005, while this consolidated appeal was pending, both the Eleventh Circuit and this Honorable Court denied Petitioner's emergency motions to stay removal pending appeal, and Petitioner was removed from the U.S. to Germany.

On April 13, 2006, in *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 2006) ("*Scheerer I*"), the Eleventh Circuit held that 8 C.F.R. § 1245.1(c)(8),[1] which banned arriving aliens from adjusting their status in the U.S., as applied to all aliens who were granted parolee status, was an impermissible construction of the governing statute

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[1] 8 C.F.R. § 1245.1(c)(8) provided that:

> The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under [8 U.S.C. § 1255]
>
> ....
>
> Any arriving alien who is in removal proceedings pursuant to [8 U.S.C. §§ 1225(b)(1) or 1229a].

(8 U.S.C. § 1255). *See id.* at 1321. The Eleventh Circuit then remanded Petitioner's case to the BIA for further proceedings.

Following the Eleventh Circuit's remand order, immigration authorities agreed to transport Petitioner back to the U.S. for the remand proceedings. However, Petitioner was never transported back to the U.S. and never had the opportunity to have his adjustment of status application reviewed because, following the Eleventh Circuit's decision, the Attorney General promulgated a new interim regulation, repealing 8 C.F.R. § 1245.1(c)(8) and replacing it with an amended 8 C.F.R. § 1245.2(a)(1) [hereinafter "Interim Regulation"].[2] The amended regulation permits arriving aliens in removal proceedings to apply for

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[2] 8 C.F.R. § 1245.2(a)(1) was amended to provide as follows: (i) *In General.* In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file. (ii) *Arriving Aliens.* In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien unless: (A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States; (B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status; (C) The application for adjustment of status was denied by USCIS; and (D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application. 71 Fed. Reg. 27,591-592 (May 12, 2006).

adjustment of status, but deprives the IJ of jurisdiction to adjudicate such applications and instead confers jurisdiction solely upon USCIS.

In light of this new Interim Regulation, the BIA once again denied Petitioner's motion to reopen, holding that the IJ lacked jurisdiction. Petitioner filed a motion for reconsideration which the BIA also denied.

Petitioner then appealed again to the Eleventh Circuit[3] contending that the BIA abused its discretion by denying Petitioner's motion to reopen and to compel the IJ to continue removal proceedings so that his adjustment of status application could be decided by USCIS.[4]

In *Scheerer v. U.S. Atty. Gen.*, 513 F.3d 1244 (11th Cir. 2008) ("*Scheerer II*"), the Eleventh Circuit held that, since the IJ would never have authority to adjudicate Petitioner's adjustment of status application, the BIA did not abuse it discretion in denying his motion to reopen proceedings before the

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[3] The basis of the Eleventh Circuit's jurisdiction over Petitioner's appeal was 8 U.S.C. § 3.1(a)(7), an appeal from a final agency determination; § 242(a)(1) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1252(a)(1), providing that judicial review of a final order of removal is governed by chapter 158 of title 28 of the U.S. Code, which in turn, confers jurisdiction to the federal courts of appeals over certain agency decisions; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, which confers jurisdiction to the federal courts of appeals to review DOJ regulations.

[4] Petitioner also challenged the validity of the new interim regulation, an argument which the Eleventh Circuit rejected. Petitioner is not petitioning for *certiorari* review of this issue.

IJ. *See id.* at 1254. As a result of this holding, Petitioner is effectively precluded from exercising his right under the Interim Regulation to apply for adjustment of status with USCIS.[5]

It is this holding for which Petitioner seeks *certiorari* review.

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[5] Adjustment of status is only available to those present within the U.S. A noncitizen "adjusts status" by applying for lawful permanent residence while in the U.S. 8 U.S.C. § 1255(a) allows a noncitizen to apply for adjustment of status to that of a lawful permanent resident if she: (1) has been inspected and either admitted or paroled into the U.S.; (2) is the beneficiary of an approved petition that makes an immigrant visa immediately available to her; and (3) is otherwise eligible for permanent residence. There are no limits in the statute to the adjustment eligibility of a parolee in removal proceedings. *See Scheerer I*, 445 F.3d at 1322.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's holding in *Scheerer II* pits the Court in direct opposition to the Ninth and Second Courts of Appeals, contravenes BIA precedent and regulatory intent, and creates a deepening circuit split in three of the most immigrant-heavy circuits in the country.

A. This Court should grant *certiorari* because the Eleventh Circuit's erroneous decision upholding the BIA's denial of Petitioner's motion to reopen on purely jurisdictional grounds negates the purpose and intent of the Interim Regulation and precludes otherwise eligible arriving aliens in removal proceedings from applying for adjustment of status.

BIA precedent dictates the process for review of a motion to reopen removal proceedings to allow a noncitizen to apply for adjustment of status. The BIA has long held that a motion to reopen is proper when a noncitizen becomes eligible for relief from removal, in the form of adjustment of status, subsequent to an order of removal. *See Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978). Where the adjustment eligibility is based upon a marriage entered into prior to the initiation of removal proceedings, the movant need only submit a *prima facie*-approvable visa petition and adjustment application to secure a reopening. *See id.*

The BIA has also established a clear standard for determining when to grant a motion to reopen so that the noncitizen – such as Petitioner – who marries while in proceedings can have the opportunity to apply for adjustment of status based upon that marriage. In *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), the BIA held that a motion to reopen to allow the noncitizen to apply for adjustment of status based on a marriage entered into while in proceedings should be granted when the following factors are satisfied:

> (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the [legacy INS] does not oppose the motion or bases its opposition solely on *Matter of Shaar*.

23 I&N Dec. at 256.

In *Velarde*, the BIA modified its earlier precedent that disallowed a motion to reopen proceedings for adjustment in any case in which the marriage giving rise to eligibility for adjustment was entered into after removal proceedings commenced. *See id.* at 254-55. The BIA, in *Velarde*, revised its prior precedent in order to "afford respondents who present sufficient evidence a single opportunity to have their adjustment applications adjudicated." *Id.*

at 257. Moreover, the BIA recognized that such an opportunity was "consistent with Congress' legislative intent in amending the marriage fraud provisions: that aliens who marry after proceedings have been initiated, and who seek adjustment of status, should be afforded one opportunity to present clear and convincing evidence that their marriage is bona fide." *Id.* (citing legislative history of marriage fraud documents).

Under this precedent, the BIA was obligated to review the *Velarde* criteria when it considered Petitioner's case upon remand from the Eleventh Circuit. As the BIA has explained: "[e]very application necessarily requires examination of the relevant factors and a determination of the weight such factors should be accorded in the exercise of discretion." *Velarde*, 23 I&N Dec. at 256. In Petitioner's case, however, the BIA never considered any of the *Velarde* factors. Instead, the BIA failed altogether to exercise any discretion when it denied Petitioner's motions on the grounds that USCIS, rather than the IJ, would have jurisdiction over the adjustment application. This failure of the BIA to follow its own precedent is an abuse of discretion. *See, e.g.*, *Osei v. INS*, 305 F.3d 1205, 1210 (10th Cir. 2002) (holding that an agency cannot reverse course from prior precedent without explanation). Further, the BIA's denial of Petitioner's motions without an exercise of any discretion whatsoever is an abuse of discretion. *See, e.g.*, *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Imputing a distinction where none is relevant, the *Scheerer II* Court disagreed, distinguishing

Petitioner's case from those in which *Velarde* is applicable, and finding that because the Interim Regulation stipulates that the IJ does not have jurisdiction over the adjustment applications of arriving aliens in Petitioner's position, a continuance is not warranted. *See Scheerer II*, 513 F.3d at 1254. In so holding, the *Scheerer II* Court failed to appreciate that irrespective of which agency (USCIS or EOIR) has jurisdiction over the adjustment of status application, Petitioner is entitled to have his application heard, *somewhere*. *See, e.g.*, *Merchant v. U.S. Att'y Gen.*, 461 F.3d 1375, 1379 (11th Cir. 2006) (holding that it is irrelevant whether DHS or the IJ has jurisdiction to hear the application; the BIA abused its discretion in denying motion to reopen so application could be heard in the proper place of jurisdiction where eligibility was established).

The *Scheerer II* Court also failed to appreciate that by denying arriving aliens' motions to reopen and continue, the BIA violates published procedure that EOIR adopted to implement the Interim Regulation. In the Federal Register notice adopting the Interim Regulation, EOIR explicitly recognized the rules for adjudicating motions to reopen and for continuances set forth in *Garcia* and *Velarde* and indicated that, until further regulations are issued, the BIA and immigration judges would apply these precedents to motions filed under the Interim Regulation. *See* 71 Fed. Reg. at 27,589-590.

In its prefatory comments in the Federal Register, EOIR notes that under BIA precedent, "it will ordinarily be appropriate for an immigration judge to exercise his or her discretion favorably to

grant a continuance or a motion to reopen in the case of an alien who has submitted a *prima facie* approvable visa petition and adjustment application in the course of deportation proceedings." *Id.* EOIR explicitly states that under the Interim Regulation, "USCIS, the immigration judges, and the BIA will continue to apply the discretionary factors in accordance with the general principles noted above, and guided by prior decisions." 71 Fed. Reg. at 27,590. Ultimately, "[w]hen an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sounds reasons for, the change, and that it has shown that the new rule is consistent with the agency's statutory duties." *NLRB v. Indianapolis Mack Sales and Services, Inc.*, 802 F.2d 280, 284 (7th Cir. 1986). The BIA's failure to follow its own publicly-announced policy, without explanation, is an abuse of discretion.

The *Scheerer II* Court, however, reasoned that this comment "cannot fairly be read to establish a policy requiring the opening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudicated during those proceedings," and found that the BIA's reliance on the Interim Regulation was a "reasonable interpretation of that regulation." *See Scheerer II*, 513 F.3d at 1254-55. Here, again, the Court failed to appreciate that the BIA's interpretation of the Interim Regulation renders null and void the ability of arriving aliens in removal proceedings to apply for adjustment of status.

Since its ruling in *Scheerer II*, the Eleventh Circuit has further extended its holding by strictly

construing 8 C.F.R. § 1245.2(a)(1) and refusing to reopen and continue the removal proceedings of arriving aliens so that USCIS may adjudicate applications for adjustment of status even though such aliens are currently residing in the U.S. *See Pierre v. U.S. Attorney*, 2008 WL 1923091 *2 (11th Cir. 2008).

In *Pierre*, the Eleventh Circuit held that because Section 1245(a)(1)(ii) vests authority solely with USCIS to adjudicate the applications for adjustment of status of arriving aliens in removal proceedings, the appropriate course of action for Pierre, who was residing in the U.S. at the time and married to a U.S. citizen, was to file an application for adjustment of status with USCIS and wait for this application to be adjudicated, "*independent* of her removal proceedings." *See id.* Once again, the Eleventh Circuit reasoned that because the IJ does not have jurisdiction over the adjustment of status application, a continuance of the arriving alien applicant's removal proceedings is not warranted, even if she is currently residing in the U.S.

As a result of the Court's rulings in *Scheerer II* and *Pierre*, even though an arriving alien in removal proceedings is permitted under the Interim Regulation to file an application for adjustment of status, and even if that arriving alien has established, in conformity with BIA precedent, *prima facie* eligibility for adjustment of status on the grounds of her marriage to a U.S. citizen, she is effectively precluded from an adjudication of her adjustment application in the Eleventh Circuit.

B. Two circuits have disagreed with the Eleventh Circuit's analysis in *Scheerer II* and ruled that the BIA abuses its discretion when it fails to consider a motion to reopen and continue removal proceedings for arriving aliens with adjustment of status applications before USCIS, creating a true circuit split.

Since the Eleventh Circuit's decision in *Scheerer II*, both the Ninth and Second Circuit Courts of Appeals have considered the question at bar and rejected the reasoning of the Eleventh Circuit on the very grounds that the *Scheerer II* Court chose to ignore: regulatory intent, BIA precedent, and the interests of justice. Indeed, both courts held that the BIA abused its discretion in denying a motion to reopen to allow for an arriving alien in removal proceedings to stay those proceedings and obtain a determination of her adjustment of status application. Although employing different analyses, both circuits effectively reason that to hold otherwise would preclude the applicant's ability to meaningfully exercise her right to file an application for adjustment of status as provided for under the Interim Regulation.

In *Kalilu v. Mukasey*, the Ninth Circuit Court of Appeals held that the BIA abused its discretion when it determined that the Interim Regulation required that Kalilu's motion to reopen "'must be denied.'" 516 F.3d 777, 779 (9th Cir. 2008). An arriving alien in removal proceedings, Kalilu filed a

motion to reopen so that he could pursue an application for adjustment of status based on his marriage to a U.S. citizen. *See id.* Upon review, the Ninth Circuit found not only that the BIA was not precluded by the Interim Regulation to reopen removal proceedings to provide time for adjudication of a pending adjustment of status application, but also that the same regulation specifically "provide[s] an opportunity for arriving aliens in removal proceedings to apply for adjustment on the basis of a valid immigration visa petition." *See id.* (citing *Succar v. Ashcroft*, 394 F.3d 8, 9 (1st Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663, 670-71 (9th Cir. 2005); *Scheerer I*, 445 F.3d at 1318).

The Court reasoned that because "[t]he opportunity that the Interim Rule affords for an arriving alien in removal proceedings to establish his eligibility for adjustment based on a bona fide marriage is rendered *worthless* where the BIA, as it purports to do in the present case, denied a motion to reopen (or continue) that is sought in order to provide time for USCIS to adjudicate a pending application," the BIA's denial on solely jurisdictional grounds was an unequivocal abuse of discretion. *See id.* (emphasis added). The Court further held that the BIA's denial of Kalilu's motion to reopen on solely jurisdictional grounds was in direct contravention of BIA precedent. *See id.* at 780 (citing *Matter of Velarde*, 23 I&N Dec. at 256-57; *Matter of Garcia*, 16 I&N Dec. at 657, modified on other grounds by *Matter of Arthur*, 20 I&N Dec 475 (BIA 1992) (providing that "discretion should, as a general rule, be favorably exercised where a *prima*

facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen.")). As a result, the Ninth Circuit remanded Kalilu's motion to the BIA for an exercise of agency discretion that must take into consideration each of the *Velarde* factors. *See id.*

Similarly, in *Sheng Gao Ni v. Board of Immigration Appeals*, the Second Circuit Court of Appeals held that the BIA erred when it denied petitioners' motions to reopen removal proceedings on purely jurisdictional grounds. 520 F.3d 125 (2nd Cir. 2008). In its analysis, the Second Circuit noted the Ninth Circuit's "dim view" of the Eleventh Circuit's holding in *Scheerer II* and remanded petitioner's motions for reconsideration by the BIA. *See id.* at 131.

In *Sheng Gao Ni*, the Second Circuit reasoned that although the BIA is correct that the Interim Regulation rests jurisdiction over petitioner's applications for adjustment of status with USCIS, the BIA erred by failing to exercise any discretion whatsoever on these grounds alone. *See id.* at 129. Significantly, the *Sheng Gao Ni* Court emphasized that the fact that petitioners were before an IJ seeking to reopen and continue their removal proceedings to apply for adjustment of status pursuant to the Interim Regulation did not mean that the IJ was being asked – or would necessarily need to have jurisdiction – to adjudicate those applications for adjustment of status in order to exercise its discretion vis-à-vis the motions to reopen and continue. *See id.* at 130 (underscoring the fact

that the "BIA did not consider . . . whether petitioners' newfound ability to file adjustment applications with the USCIS warranted a favorable exercise of its discretion to reopen and continue the proceedings and thereby lift the removal orders").

As with the *Kalilu* Court, the *Sheng Gao Ni* Court stressed that in its denial of petitioners' motions to reopen and continue, the BIA "inexplicably departed from its established policy of granting motions to reopen in order to permit the adjudication of status-adjustment applications." *See id.* at 132 n.4 (citing *Matter of Garcia*, 16 I&N Dec. at 657 ("we believe that discretion should, as a general rule, be favorably exercised where a *prima facie* approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen.")).

It is clear from the above discussion that there is a circuit split ripe for resolution. The Eleventh Circuit's holding in *Scheerer II*, and subsequently in *Pierre*, creates a fissure in justice among the circuits by endorsing the BIA's perpetuation of an absolute bar to the application for adjustment of status by arriving aliens in removal proceedings. This Honorable Court should grant *certiorari*, resolve this split, and restore consistency and justice across the circuits.

CONCLUSION

For the aforementioned reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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